No. 15,078

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED

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ARGUMENT.

Appellant, in his opening brief, completely ignores the two central, critical facts of the case, which, in themselves, answer all the arguments advanced by appellant. These facts are the following:

1. Appellant Himself Breached and Frustrated the Performance of the Contract Between the Parties.

The only question presented by the contract between the parties and the instant suit was and is the value of the shares sold by appellee to appellant. A principal item in that determination was the value of the accounts receivable owned by the corporation. Naturally, the more the accounts receivable were worth, the more appellee would

be entitled to, and conversely, the less the accounts receivable were worth, the less appellee was entitled to receive from appellant. The parties realized the temptations this presented and sought to resolve their anticipated difficulties by providing in the contract that:

> "Accounts receivable shall be evaluated in accordance with standard accounting methods as said accountants and auditor may agree upon by majority vote. In reaching said determination said accountants shall use a standard accountants' handbook accepted by the American Society of Accountants, or a like national society." [Tr. p. 6.]

Both accountants, Kaneshiro representing appellee and Viray representing appellant, testified that while the parties to this action were shareholders in the corporation, and prior to the execution of the agreement, a reserve had customarily been set up for bad debts. [Tr. pp. 63, 106.] Both accountants further testified that it was sound accounting practice to provide for such reserve. [Tr. pp. 63, 106, 117. See also 176-177.] In spite of this accepted procedure and the earlier practice of the corporation, appellant, in violation of his agreement with appellee, ordered Mr. Viray, his accountant, to write off all debts which were not acknowledged by the debtors to whom routine letters of inquiry had been sent. [Tr. pp. 94, 104, 107.] See transcript, pages 116 through 120, where Mr. Viray testified that Mr. Hines had given him direct orders to depart from the standard he (Mr. Hines) had agreed to with Mr. Perez. As the Court below stated at page 120 of the transcript, "He (Mr. Viray) said he did these things because Mr. Hines told him to do them and that it wasn't good accounting practice to do it." That this departure was deliberate and made only for the purpose of defeating

appellee's rights under the contract is clearly demonstrated from the fact that immediately following the audit the corporation resumed the reserve method for treating bad debts. [Tr. p. 106.]

Appellant breached and frustrated the performance of the contract in still another way. Mr. Kaneshiro, the auditor appointed by appellee, completed his audit "in a short while after he was requested to perform the work." [Tr. pp. 60, 209.] Mr. Viray, however, dragged his feet. The Court below placed the blame for this situation upon appellant, stating from the bench [Tr. p. 208]:

> "At the outset it should be pointed out that ordinarily an audit of the type contemplated and the required appraisals should have been completed three months after the agreement was entered into, but it was [195] permitted to extend over a much longer period of time. The Court is of the view and so holds that this delay was largely due to the failure of the auditor selected by the defendant, and under his control as an employee, to perform his share of the work in a reasonable period of time."

The foregoing in itself is sufficient refutation of appellant's contentions (1) that "he did not breach the contract" and (2) that "appellant has never disputed the fact . . . that the actual value should be determined as provided in the contract." (App. Op. Br. pp. 16, 21-22.) We will presently deal with these contentions in more detail. Suffice it to say at this point that appellant's entire argument is predicated on the contention that there was no breach of contract on the part of appellant, which contention, as we have seen, is utterly devoid of merit. This brings us to the second main factor in the case which appellant has ignored or overlooked.

2. Appellee Was Entitled to Judgment in the Court Below Even Though There May Not Have Been a Technical Breach of Contract.

Even if we ignore appellant's deliberate breach of contract as testified to by his own accountant, appellee nevertheless would be entitled to a judgment. Appellant predicates his argument, in large measure, on the contention that appellee was not entitled to recover because there had been no breach of contract. This contention is erroneous both in fact (as we have already shown) and in law.

When the parties entered into their contract, they understood that any method they would adopt for determining the value of the shares sold would create difficulty since the issue was a complex one. They therefore provided for two accountants of their own choosing to attempt an evaluation of the business. [Tr. pp. 5 and 6.] They then provided that if the two accountants could not agree, their differences should be submitted to a third accountant, Robert Wiseman. [Tr. p. 6.] If the parties were still not in agreement, the matter then would be submitted to the attorneys for the respective parties. [Tr. p. 6.] Then if the attorneys could not agree, the matter was to be submitted to a court of competent jurisdiction. This last provision is set out in the contract as follows:

> "In the event any difference of opinion should result between said counsel as a result of said audit, either party hereto shall have the right to take said difference of opinion into any Court with jurisdiction thereof in order that said difference may be resolved.

> Any such recourse to Court will be limited to resolving any difference that the parties hereto have been unable to resolve." [Tr. p. 13.]

From the foregoing it is plain that there need not have been a technical breach of contract for either party to invoke the jurisdiction of the court. It was sufficient that the accountants and the attorneys could not agree; the court could then resolve any remaining differences.

At the pretrial conference, counsel for both parties agreed and stipulated that "The parties have been unable to reconcile their differences and the entire contract is in dispute." [Tr. p. 13.]

Accordingly, since the entire contract was in dispute and since the court, by agreement of the parties, had jurisdiction over "any difference that the parties hereto have been unable to resolve," all of the issues arising out of the contract were properly before the court without reference to the question whether either party had breached the contract.

We respectfully submit that the foregoing, in itself, is sufficient refutation of every argument made in appellant's opening brief. We will nevertheless treat each argument raised by appellant with particularity to show that even accepting the arguments made by appellant without reference to these underlying defects there is no merit whatsoever in those contentions.

I.

The Court Below Properly Refused Appellant's Motion to Dismiss the Action on the Ground of Prematurity.

Appellant argues that the action filed by appellee "for breach of contract was premature because the conditions precedent to suit as expressed in the contract of the parties had not been met at the time that the action was filed." (App. Op. Br. p. 10.) As we have already stated and shown, a breach of contract was not necessary to confer jurisdiction upon the court. Nevertheless, there is no merit to appellant's argument that the supposed conditions precedent had not been met.

A. Appellant contends, initially, that "The two auditors failed to produce an audit working together." (His Brief, p. 13.)

We have been unable to find any definition of "joint audit" in any available authority. Appellant, however, seems to take the position that the parties contemplated that both accountants would sit down together and wrestle with each entry until they came to a joint understanding and finally a single audit. We doubt that any accountant would care to support such a definition of the term; and certainly the parties themselves did not contemplate such a procedure. The parties agreed that Mr. Wiseman should adjust the differences between the accountants. Apparently, then, the parties did not expect the single audit that appellant now contends he was entitled to; otherwise, what reason would there have been for a third accountant to reconcile the separate audits made by the two accountants? Apparently this was the understanding of the accountants themselves, for they both testified that they did, in fact, prepare a "joint audit" as they under-

stood the term. Both Mr. Kaneshiro and Mr. Viray testified that they worked together and prepared a joint audit, contrary to appellant's contention. In support of these assertions, we respectfully direct the Court's attention to the following quotations from the Transcript:

Mr. Kaneshiro (appellee's accountant):

At p. 44:

"Q. Were any of those items jointly verified by you and Mr. Viray? A. It was, sir.

* * * * * * * *

Q. Now, we have here the original books and records of Island Service Company, Inc., and if you need to refer to any of those, we will do so. The accounts receivable is listed as $69,767.24. Can you kindly tell the court how that figure was reached? A. The accounts in the record were checked to arrive at the figure.

Q. Was that a joint check by you and Mr. Viray? A. That is right."

* * * * * * * *

At p. 45:

"Q. You have 'Inventory-Merchandise,' $48,506.65. Will you state to the court how that figure was reached? A. The inventory, the actual physical count was taken by a representative of Mr. Hines, and Mr. Viray and I did the pricing on the extensions and additions and the figure is the actual figure that we arrived at."

* * * * * * * *

At p. 46:

"Q. Who actually figured the cost on both of those two inventories? A. It was done jointly.

Q. By whom? A. Ireneo Viray and myself."

* * * * * * * *

At p. 47:

"Q. And you have a reserve for depreciation of $61.25. How did you determine that? A. We estimated the life of the equipment throughout the [19] year that had expired and made a calculation as to the length of life of the equipment for five years since the time of purchase and we divided the cost by five to arrive at the amount of depreciation.

Q. When you say 'we,' who do you mean? A. Mr. Viray and I.

Q. Was that depreciation schedule jointly agreed upon by you and Mr. Viray? A. I am not sure about that, sir, but the procedure was agreed upon."

* * * * * * * *

At p. 48:

"Q. And you have listed a reserve for depreciation on furniture and fixtures of $108.42. How did you arrive at that figure? A. We estimated the life of the furniture and fixtures and determined the expired portion.

Q. Now when you say 'we,' you mean you and Mr. Viray? A. That is right, sir.

Q. You have buildings listed as $26,651.92. I refer you to Plaintiff's Exhibit 2: 'Fixtures attached to the realty, excluding mechanical contrivances, shall be valued at cost to the corporation, depreciated to October 1, 1952, which depreciation shall be over the period of the lease of the corporation of the premises upon which the corporation is located,' and ask you how you reached that figure of $26,651.92 for the buildings? A. We checked the record to arrive at the actual cost of the buildings."

* * * * * * * *

At p. 49:

"Q. And you have a reserve for depreciation of $4,882.82. How did you reach that figure? A. It was jointly agreed between Mr. Viray and myself."

* * * * * * * *

At p. 51:

"Q. Now, as I understand it, in figuring these liabilities on the accounts payable that was an actual joint check of the records? A. That is right."

* * * * * * * *

At p. 53:

"Q. And the statement so filed reflected that net profit for the nine months? A. Just a moment. I retract, sir. That is the surplus we determined that we filed with the Government of Guam, sir.

Q. And who is 'we'? A. Mr. Viray and I determined that. It is the amount that was on the record as of September 30, 1952.

Q. As being the net profit of the corporation for the nine months of 1952? A. That is right."

* * * * * * * *

At p. 54:

"Q. Did you and Mr. Viray in your joint audit use standard accounting methods? A. Yes, sir.

Q. Did you and Mr. Viray, of your own personal knowledge, have conferences with Mr. Sherwood Wiseman subsequent to the audit? A. Yes, sir.

Q. I will ask you whether during these conferences and as a result of those conferences with Mr. Wiseman you and Mr. Viray jointly agreed to certain adjusting entries to be made by Mr. Wiseman? A. That is right.

Q. You agreed to those adjusting entries? A. That is right.

Q. Did Mr. Viray in your presence agree to them? A. That is right."

* * * * * * * *

At p. 55:

"Q. You have testified that this was a joint audit? A. That is right.

Q. Conducted by yourself and Mr. Viray. Now that is not true, is it? You and Mr. Viray conducted your audits for the most part separately? A. No, sir, for the most part together. We arrived at our own findings and reconciled them."

* * * * * * * *

At p. 60:

"Q. Now, in the final analysis, there was not a joint audit between you and Mr. Viray? A. There was, sir. We conducted an audit as of September 30."

* * * * * * * *

At p. 62:

"Q. Do I understand that you worked independently on your figures in the audit and Mr. Viray did and on some of them you worked together? A. That is right.

Q. This balance sheet represents the results of your audit—the figures upon the items where you and Mr. Viray agreed and where you disagreed they represent your findings? A. That is right."

* * * * * * * *

Mr. Viray (appellant's accountant):

At p. 78:

"Q. There is a difference between your and Mr. Kaneshiro's figures. Could you kindly state to the court how you reached your total of $17,250? A. I do not remember now how this was established, but I do remember we made an agreement on the buildings that the figures he had and I had which were the same."

* * * * * * * *

At p. 86:

"Q. Now, leaving aside all the differences, other differences, between you and Mr. Kaneshiro, let me ask you if you prepared your audit pursuant to the instructions contained in the joint memorandum? A. Yes, sir.

Q. And did you use standard accounting methods in that? A. Yes, sir.

Q. Let me also ask you if subsequent to your audit you had any meetings and discussions with Mr. Sherwood Wiseman and Mr. Stanley Kaneshiro in resolving any of the differences between your audit and Mr. Kaneshiro's audit? A. Yes, sir.

Q. Where were those meetings held? A. I do not remember now, sir, but I believe we held meetings more than three times.

Q. And were you and Mr. Kaneshiro present at those meetings? A. Yes, sir.

Q. Let me ask you were you in agreement and was Mr. Kaneshiro in agreement when Mr. Wiseman made adjustments? Were they acceptable to both of you? A. Yes."

* * * * * * * *

At p. 109:

"Q. Isn't it also true that in your conferences with Mr. Wiseman, that is the conferences between Mr. Kaneshiro and yourself, all of the differences between the balance sheet of 29 September, 1952, and the one of June 23, 1954—the major differences which you have discussed and testified to—they were resolved and reconciled? A. Yes, sir.

Q. And you accepted Mr. Wiseman's adjustments to both your balance sheet and Mr. Kaneshiro's balance sheet? A. I did.

Q. Now, just to clear up a minor item, you said that you and Mr. Kaneshiro conducted your audits together? A. He did his separately.

Q. They were both in the same physical location and they went on at the same time chronologically speaking? A. Yes.

Q. Isn't it true he and you discussed certain items and agreed upon them, such as inventory of merchandise? A. We discussed various items and agreed on some and some we didn't."

B. Appellant next contends that Mr. Wiseman, the accountant who was to reconcile the two statements, "made no attempt at a reconcilation," and accuses Mr. Wiseman of "bias" because he did not go back to the original books. (App. Op. Br. pp. 14-15.)

Again, the contract between the parties did not specify how the reconcilation was to be made. The accountants, however, were all satisfied that the reconcilation was honestly and properly made. We have already quoted from the Transcript at page 54 and page 109 where both Mr. Kaneshiro and Mr. Viray stated that they were satisfied with the reconciliation (*supra*). In this connection, we might add that had there been any question whatsoever

that the reconciliation was not being made in accordance with the understanding between the parties, it is only fair to assume that Mr. Viray, who was then employed by appellant, would have reported to appellant, who in turn would have raised the issue long before or even at the trial.

In addition to the portions of the Transcript already quoted showing that both accountants accepted the procedure followed by Mr. Wiseman, see the following additional pages in support of the same proposition: 103, 107, 133 and 179.

To bury appellant's complaint that Mr. Wiseman "did not go back to the original books" completely and finally, we should like to call the Court's attention to Mr. Wiseman's testimony at page 178 of the record where he testified that he was directed by the parties not to go back to the books of the corporation but to limit himself to reconciling the differences in the two audits.

Certainly, in view of the foregoing, appellant has no basis for complaint about the services rendered by Mr. Wiseman.

C. Appellant next complains that counsel for the parties did not make any attempt to reconcile the differences between the parties as the parties contemplated when the contract was entered into. (App. Op. Br. p. 16.)

Here, again, the record does not support the contention. The Court below specifically found that "Counsel for plaintiff and defendant agreed that the respective counsel for the two parties were unable to reconcile the differences upon the actual value of the corporation and that the entire contract was in dispute." [Tr. p. 19.] This finding is predicated on an express stipulation between counsel

at the pretrial hearing [Tr. p. 13] which the Court properly construed to mean that the attorneys could not adjust the differences between them. [See Tr. pp. 134-135 and 185.] In any event, as late as the pretrial conference, when an attempt was made by the Court to get an agreement between counsel, no such adjustment was possible.

D. Next, appellant complains that the third appraiser "made a complete, independent appraisal of all assets" instead of comparing the appraisals of the other two appraisers. (His Brief p. 16.)

This, indeed, is a peculiar twist. As we already pointed out, when appellant objected to Mr. Wiseman's reconciliation of the audits made by the other two auditors, he complained, in his Opening Brief at page 14, that Mr. Wiseman did not go back to the original books and instead relied on the audits prepared by Mr. Viray and Mr. Kaneshiro. Here he goes off in the opposite direction and complains that the third appraiser made an independent appraisal rather than relying upon the appraisals already made. This is characteristic of the arguments submitted by appellant.

Actually, the method used undoubtedly was within the agreement of the parties, for when appellant, through his attorney, retained the services of Mr. Schwendinger, Mr. Schwendinger did exactly what Mr. Norris did as the third appraiser. Acting on the instructions of Mr. Crain, attorney for appellant, he made an independent appraisal, precisely the procedure followed by Mr. Norris in this case. [Tr. pp. 188-189.] It therefore hardly lies in appellant's mouth to complain about the procedure followed.

II.

The Findings Are Sufficient to Support the Judgment.

Here, again, appellant predicates his argument that the findings are not sufficient, on the erroneous premise that appellee could not recover unless he established a breach of contract. He missed again the essential point that the entire contract was in dispute, and the determination of the value of the stock was before the Court without reference to the question of a breach of contract. As the Court below properly stated [Tr. p. 209]:

> "The agreement further contemplated that the matter should be presented to the Court on those points of disagreement, and in the pretrial order counsel stipulated that the entire agreement was in dispute, so the Court is faced with the responsibility for making a complete determination."

But even on appellant's own premise, the findings are sufficient. The "primary and basic test of the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision." (*Shapiro v. Rubens* (9 Cir.), 166 F. 2d 659, 665.) The findings in this case meet that test. The findings are complete and comprehensive on every essential issue presented for decision.

Appellant complains, at page 18 of his Brief, about the failure to make three findings in particular. None of them presents a substantial question.

A. Appellant contends that the Court should have found whether attorneys had orally modified the contract of the parties.

There was no evidence at all to support the contention that there was a modification of any kind. Appellant argues that Mr. Schwendinger's appraisal was made after counsel had agreed to his appointment. As a matter of fact, Mr. Turner, representing appellee, testified, at page 202 of the Transcript, that he advised Mr. Crain, attorney for appellant, that Mr. Schwendinger was "unacceptable and, as the record shows, it was prior to the actual appraisal." Mr. Turner had reference to a letter advising Mr. Crain of this fact dated prior to the appraisal. While Mr. Crain testified originally to the contrary, when confronted with documentary evidence, he admitted [Tr. p. 191] that he had been confused and wished to correct his testimony.

Be that as it may, appellant has been unable to show that either attorney had power to bind his client by modifying the agreement without the client's consent. Such a power, is generally beyond the scope of the duties of an attorney at law. Compare Section 283 of the Code of Civil Procedure of the State of California.

Moreover, as the Court below found, Mr. Schwendinger's appraisal was without meaning to the parties to this action because "It was based exclusively upon the value to his company, assuming that all of the heavy equipment involved was to be transported to the United States to be sold as useable equipment or as parts." [Tr. pp. 210-211.] Specific findings on this issue, therefore, would have been without any point whatsoever.

In any event, the contract was complied with to the letter without modification. The contract provided that

"In the event said two appraisers are unable to agree upon the value of any asset, as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final." [Tr. p. 7.] Consistent with this authority "said two appraisers appointed James Norris as the third appraiser and he appraised the value of said assets as $34,391.00." [Tr. p. 18.] The court below accordingly found "the value of said appraised assets to be $34,391.00 in accordance with the appraisal of said James Norris." [Tr. p. 18.] Of more immediate interest, however, is the fact that the exact contractual procedure was followed by the parties, as set out above, *"about four or five months" after the parties had supposedly modified the contract.* [Tr. p. 191.] Certainly, then, there can be no substance to the complaint of appellant that the court failed to find whether the contract had been orally modified when the parties, themselves, did not treat the contract as having been modified or changed.

B. Appellant next complains that there was no finding whether the accountants had made a joint audit.

While it is technically true that in Finding No. 6 [Tr. p. 18] the Court did not state that the books and records were "jointly" audited, nevertheless:

1. The record amply shows, as we have demonstrated above, that the audit was joint;

2. The Court did find that the accountants "agreed to certain adjustments to their computations to be made by Wiseman" [Tr. p. 19], so the defect, if any, was cured by the complete agreement among Mr. Viray, Mr. Kaneshiro and Mr. Wiseman;

3. As we have already shown in our opening statement, if there was no joint audit, appellant himself frustrated the joint audit by making a demand on Mr. Viray not con-

sistent with the terms of the agreement. Having instructed his accountant to disregard standard accounting procedures which he agreed to follow, and having permitted his accountant to take over a year to complete an audit which appellee's accountant finished in three months, it is with poor grace that appellant now complains that there was no joint audit or finding to that effect. Appellant should not be allowed to complain that a condition precedent, which he himself frustrated, was not complied with.

C. Appellant next complains that there was no finding whether the contract had been breached.

We have discussed several times above the proposition that breach of contract was not necessarily an issue before the Court, it being sufficient that the elaborate procedures set out in the contract for resolving the differences were unworkable. To this the parties had already stipulated.

Generally, in connection with all of these alleged omissions, even if appellant were technically correct that such findings were omitted, he still has failed to show any reversible error. "The duty of the trial court to make findings of fact should be strictly followed. But such findings are not a jurisdictional requirement of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here." (*Hurwitz v. Hurwitz,* App. D. C., 136 F. 2d 796, 799, 148 A. L. R. 226, 229.)

In this connection, see also *Wells Fargo Bank & Union Trust Co. v. Imperial Irrigation District* (9 Cir.), 136 F. 2d 539.

III.

The District Court Did Not Err in Directing Interest to Be Paid From November 10, 1955.

In contending that the Court erred in ordering interest to be paid from November 10, 1955, appellant again completely misunderstood the import of the order of the Court below. The Court was merely complying with the agreement of the parties in directing interest to be paid in the manner stated and was not awarding interest on the judgment. The contract between the parties provided that the first payment from appellant to appellee should be due 15 days after "actual value" of the shares was determined. [Tr. p. 8.] Since the Court, sitting as an umpire by agreement of the parties, made its determination of actual value on October 26, 1955, the first payment was due on November 10, 1955, and was delinquent immediately thereafter. [See Tr. pp. 27-28, 208-215.] Therefore, interest was due and payable to appellee on and after that date regardless of when the judgment was entered. Appellant's argument, therefore, is completely meaningless and misses the point in its entirety.

Even at that, appellant was favorably treated by the Court below. Appellant, as we have shown, deliberately delayed the determination and time of payment, and the Court should have ordered interest to run from the day the first payment would have been due but for the breach of the contract on the part of appellant.

IV.

The District Court Did Not Err in Awarding Costs to Appellee.

Again, appellant predicates his argument on the erroneous thesis that appellant had not breached the contract and on the further erroneous contention that a breach of contract was necessary to substantiate appellee's case.

Even if that were not so, appellee is clearly the "prevailing party" within the meaning of Rule 54(d) of the *Federal Rules of Civil Procedure*. The "prevailing party" is the party in whose favor judgment is or should be entered. (See cases collected at 33 *Words and Phrases* (Permanent Edition), 512 *et seq.*) Clearly, for all the reasons explained above, appellee was properly before the Court and properly entitled to judgment, and therefore within the rule of *Lueben v. Metten,* 100 P. 2d 935, 937, quoted as follows at page 22 of Appellant's Opening Brief:

> "Costs are said to be in the nature of incidental damages allowed to the successful party to indemnify him against the expense of asserting his rights in court, when the necessity for so doing was caused by the other's breach of legal duty."

V.

The Recovery Was Within the Issues Set Out in the Complaint.

Appellant complains, finally, that appellee failed to establish a breach of contract in accordance with the allegations of the complaint. Again, the argument is fallacious. The complaint pleaded the contract in its entirety and alleged failure to pay on the part of appellee. As a matter of fact, as the Court and the parties understood, the parties had exhausted the procedures set out in the contract. Noth-

ing more remained to be done except to submit the differences, and by stipulation this included the whole contract, to the judgment of the Court. The case was fully and properly presented on that theory, all available testimony and evidence was submitted, and the case tried without any recorded objections of any sort on this point. Finally, judgment was entered in accordance with the complaint.

Conclusion.

Appellant, by his own act and deed, prevented and delayed the accountants from arriving at a determination in accordance with his own agreement with appellee. The only recourse available to appellee under the contract was to the Courts. Consistent with the agreement of the parties, the Court made the final determination after listening to the evidence in its entirety. We therefore respectfully submit that the judgment of the Court below should be affirmed.

If the Court should find any technical defect in the form of the findings of fact and conclusions of law, even then the judgment should not be reversed but merely remanded to the trial court for more adequate findings without retrial.

Perry v. Bauman (9 Cir.), 122 F. 2d 409;

Paramount Pest Control Service v. Brewer (9 Cir.), 177 F. 2d 564;

Gillis v. Gillette (9 Cir.), 177 F. 2d 7.

Dated: October 12, 1956.

Respectfully submitted,

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Attorneys for Appellee.